No. 15442

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

vs.

VERDA A. GOREY,

Appellee.

BRIEF OF APPELLEE, VERDA A. GOREY.

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The Pleadings.

The complaint on file seeks to recover on a policy of life insurance issued by appellant on the life of George E. Gorey, deceased.

The answer admits the issuance of the insurance policy, and the death of the insured therein, but denies liability on the part of appellant by reason of alleged false statements and concealments contained in the application signed by the insured and alleged false statements made by the insured to appellant's medical examiner.

The Issues Involved.

The issues involved in this appeal as raised by appellant are:

1. Did the insured, George E. Gorey, in his written application for insurance make material false representations to appellant?

2. Did the insured by means of false answers in the application conceal material facts from appellant?

3. Did the insured falsely represent to appellant's medical examiner that he had never undergone an electrocardiogram?

4. Was the insured in good health at the time of his application for insurance and delivery of the policy?

5. Did appellant rely upon the application, appellant's medical examiner's report, and the report of inspection by defendant's agent, and is the appellee liable on the policy?

ARGUMENT.

The Evidence.

The parties entered into the following stipulation at the trial [R. 34]:

"Mr. McManus: Your Honor, I believe that counsel for the defendant and myself can arrive at some stipulations.

The Court: Very well, Mr. McManus, will you stand at the lecturn and present them.

Mr. McManus: This is a statement of admitted facts. One, that the plaintiff is and at all times mentioned in the complaint was a resident and citizen of the State of California and is the surviving wife of George E. Gorey, now deceased. Two, that the defendant is a corporation organized and existing under the laws of the State of Tennessee and a resident and citizen of the State of Tennessee and that it was and is doing business in the County of Los Angeles, State of California. Three, that on or about April 14, 1954, said George E. Gorey made and executed and delivered to the defendant in Whittier, California, his written application [8] for the issuance to and delivery to him of a life insurance policy on his life in the amount of $3,300 upon the family income plan; that a true copy of said application marked Exhibit A is attached to and made part of the defendant's answer on file herein. Four, that said George E. Gorey paid defendant the sum of $8.34 on or about April 14, 1954, as the first monthly premium on said policy. Five, that the defendant relied upon the application, the report of the medical examiner of the defendant and the report of inspection by the defendant's agent and under date of April 30, 1954, it issued and thereafter

delivered to George E. Gorey its life insurance policy number 2081957 on his life and that plaintiff was and is named as beneficiary in said policy. That said life insurance policy provides that in the event of the death of said George E. Gorey during the second year of the policy the beneficiary would have the right to elect to receive payment of the sum of $8,824 as commuted proceeds payable under said policy in lieu of all other settlement provisions thereunder in full settlement of all claims and rights of the beneficiary. Six, that said application, Exhibit A, and said policy of insurance provides that the policy would become effective only if delivered thereafter to the insured during his life in good health and that a true copy of said application, Exhibit A aforesaid, was attached to and made part of said policy at the [9] time of issuance and delivery thereof to said George E. Gorey. Seven, that said George E. Gorey died on November 19, 1955, at Whittier, California, and up to that time all premiums called for by said policy had been fully paid. Eight, that after the death of said George E. Gorey and before the commencement of plaintiff's action herein, plaintiff gave defendant notice and proofs of death of said George E. Gorey and demanded payment of the sum she claimed to be due under said policy. Nine, that after said receipt by defendant of the notice and proofs of death of said George E. Gorey and before plaintiff filed her action herein, the defendant made an investigation of the facts and circumstances connected with his applying for and securing said policy of insurance and that it advised the plaintiff of said investigation of the defendant and told the plaintiff it was not liable for and it would not pay her the death benefit mentioned in the policy nor any other sum except the sum of

premiums it had received thereunder plus interest on the same from the dates of payment. Thereafter that defendant advised plaintiff said premiums and interest amounted to $168.07. Ten, that said application, Exhibit A aforesaid, stated among other things the following questions to be answered by the applicant and contains the following answers to said questions, to wit, Question 54, 'Have you ever had any ailment or disease, (b) Heart or lungs, yes or no?' 'No.' That means that answer is 'No' counsel. [10]

Mr. Morrow: That means that's the answer that's given to the question?

Mr. McManus: Yes. Question 60, 'State names and addresses of physicians you have ever consulted and give the occasion by reference to question number and letters above.' 'None.'

Mr. Morrow: The answer is 'No,' counsel?

Mr. McManus: Yes. That the defendant relied upon said application and on said answers to said questions in issuing and delivering said policy to said George E. Gorey. Eleven, that on April 20, 1954, said George E. Gorey was examined by Sutton H. Groff, M.D., defendant's medical examiner, at Montebello, California in connection with said application, Exhibit A aforesaid. That said medical examiner's written report of said examination was set forth on the reverse side of said application, Exhibit A aforesaid, and was delivered to the defendant before said policy was issued. That said medical examiner's report was exhibited to plaintiff's counsel on May 11, 1956, and that the defendant relied upon said medical examiner's report in issuing and delivering said policy to said George E. Gorey.

Mr. Morrow: Pardon me just a moment. The stipulation is correct, Mr. McManus. May I inquire privately of Mr. McManus, your Honor?

The Court: You may.

Mr. McManus: And it is further stipulated that the [11] defendant tendered and delivered to plaintiff its check number 42127 in the plaintiff's favor for $168.07 representing the premiums theretofore paid on said policy plus interest.

Mr. Morrow: So stipulated.

The Court: I assume we include in that stipulation that the plaintiff refused to accept that check?

Mr. Morrow: We were just discussing that matter. We don't know quite how to put it. Anyway, that's the understanding. She didn't accept the check in payment of the death benefit provided in the policy.

Mr. McManus: That's correct, your Honor."

Dr. R. R. Kerchner, Sr., testified in part as follows [R. 55]:

"Q. And after receiving the report from Dr. Windsor, did [31] you make a final diagnosis of Mr. Gorey's condition? A. I did.

Q. What diagnosis did you make at that time? A. I made a diagnosis—while he was present I made the diagnosis of coronary heart disease of probably not too severe, that is, too far advanced, but there was no way of telling that to him definitely but I explained to him he did have this trouble and prescribed for him a regime of lighter work, less forceful exercise, discontinuing smoking and overeating perhaps, anything that might produce increased rate of the heart which would likely bring on the pain which he experienced and which would cause him perhaps trouble.

Q. If I may interrupt you, did you explain to Mr. Gorey on October 31 or at least one of the visits your diagnosis was as you have prescribed? A. I did.

Q. Will you explain briefly in so-called layman's language what coronary insufficiency means. A. Coronary insufficiency means an insufficient amount of blood coming from the aorta through the coronary arteries. There are two arteries, one left and one right that encircle the heart coming over the top and around the heart that supply the blood to muscle of the heart which enables it to beat and when the heart does not supply enough blood or the blood is not able to get through these arteries sufficiently then [32] pain develops because the muscle does not have enough oxygen which comes by way of the blood stream. That's coronary insufficiency.

Q. As I understand it, you diagnosed his condition as coronary artery disease? A. Yes, that's what produces coronary insufficiency, coronary artery disease.

Q. Is there another medical term for that type of coronary artery disease? A. Arteriosclerosis is the technical name, hardening of the arteries, hardening of the coronary arteries.

Q. It's coronary— A. It's arteriosclerosis.

Q. It's coronary arteriosclerosis? A. That's right.

Q. Did the electrocardiogram tracing in your opinion confirm your tentative diagnosis that Mr. Gorey was suffering from that condition and disease? A. It did.

Q. Were you aware in October, 1953, that Mr. Gorey was in the business of building and develop-

ing tracts? A. I knew he was a carpenter in the building trade.

Q. And as I understand it, you advised him to lessen his physical activity? A. I did. [33]

Q. Did you prescribe any other treatment for him at that time? A. I gave him a prescription for nitroglycerin tablets to carry with him to be used as needed. If he developed a severe pain that lasted longer than just a few seconds, to take a nitroglycerin tablet under the tongue and I also advised him to come in in six months for another repeat electrocardiogram or before if his condition became more severe.

Q. Did Mr. Gorey consult you after October, 1953, with reference to that particular complaint or disease, namely, coronary arteriosclerosis? A. He did not.

Q. Did he consult you professionally after October, '53 for any other complaint? A. He did.

Q. Will you state the dates, please, and what the complaint was. A. In March of 1954 he had an injury at work. He sprained his knee twisting while working and we had to aspirate his joint. He had hematosis or hemorrhage in the knee joint cavity. We had to withdraw blood from his knee. He was in three or four times, discharged April 7, March 24 to April 7 for the specific condition. On August 15, 1954, was the last I saw him professionally at which time he was complaining [34] of occipital headaches. Nothing about the heart at all. I prescribed niacin tablets for relief of his headache. I have one here. If not relieved, temporarily relieved at least with these tablets, he was to consult a neurologist for a further study from a neurological standpoint, which was a study of the nervous system.

Q. That's the last time you saw him professionally? A. That's the last time I saw him, that's right."

Cross-Examination.

"Q. (By Mr. McManus): Dr. Kerchner, you prescribed nitroglycerin tablets for the patient. You don't know, however whether he ever took one of those pills, do you? A. That's right, I don't know that he did.

Q. And when you advised Mr. Gorey as to his physical condition, especially concerning his heart, did you tell him in lay terms or did you tell him in medical terms what was wrong with him? A. I told him lay terms. I am certain of that.

Q. And when you testify in court now, are you able to recall all of this which occurred some two or three years ago from your own memory or are you testifying only from your records? A. No. What do you mean, what part of this testimony, what I just now talked with you or with Mr. Normandin?

Q. The testimony which you have given this afternoon from the stand, is that— A. The majority—the major portion of it is from the record. As to what words I spoke to him, I am just recalling from memory the essential part, like the advice I gave him, I gave him about advising him to stop smoking and [36] reduction of exercises and so on I have recorded but a large part of the things like description, what I told him about his heart, I am recalling just from memory only.

Q. You are able to recall now at this time what you told him? A. I only because I do it to other people. I tell everybody. I have practiced the same with him as I have with others. I do not specifically

recall that I showed him pictures of the heart but I show it to people who have this trouble, explain it to him.

Q. What I am trying to get at, Doctor, is not how you treat your other patients but how you treat this particular patient, if you can remember of your own knowledge now what you told him at that time. A. No, I can't remember exactly the words that I told him.

Q. But you do recall, do you, tell him that his condition was not too far advanced? A. That's right.

Q. Is that your testimony? A. That's right.

Q. And, as a matter of fact, you never can tell a heart patient that his condition is really bad, can you, Doctor? A. That's right. We have to be very careful because of creating a neurosthenia or a cardiac invalid. The patient [37] is sometimes so worried about their heart, they then will have to be an invalid or their family will have them sick all the time, that they actually will feel sick. So we actually have to be very careful the way we tell them about it. Sometimes we can't even tell them. It is very very bad for them to give them that. It is a hardest thing to tell a patient exactly even if we know it. The electrocardiogram cannot always show exactly how severe this trouble is. It might have been very severe at that time. It might not have been, because the record only showed that he had this trouble after he exercised. If he hadn't exercised, we wouldn't know he had it at all.

Q. And the electrocardiogram is not always correct, is it, then? A. If it is positive, yes, but negative the electrocardiogram isn't always correct.

Q. What I had reference to, Doctor, was the statement of Dr. Travis in which he said that the electrocardiogram was strongly suggestive of coronary insufficiency. Wouldn't that indicate that he wasn't positive that that was what was wrong with him? A. Well, I don't know what Dr. Windsor had in mind other than what he stated there himself that you read from. I haven't talked with him about it. Of course, you have to know laboratory work is used in conjunction with clinical [38] findings, the history of a patient taken all combined to make a diagnosis. But the electrocardiogram is a pretty good thing. It has been pretty well established through all medicine that it is a safe thing to go by in the majority of cases at least.

Q. In the majority. In other words, it could on occasion be wrong, if possible? A. It wouldn't be as pronounced. It wouldn't show up only on exercise. If he didn't have coronary artery disease, he would not have developed the findings, the segment shifts on exercise. I will have to say that was a positive finding. I don't think there is any question.

Q. You did advise another electrocardiogram? A. Yes.

Q. After another six months? A. That's right.

Q. Did he come back for an electrocardiogram? A. No.

Q. He did come back to see you, though, professionally, did he not? A. That's right.

Q. At that time did he make any complaint concerning his heart condition? A. No.

Q. He did come back about six months after you first [39] saw him in October? A. Let's see, October to March. That was about five months. May I say a word?

Q. Yes. A. I saw George quite a number of times. I liked him very much. He was a nice fellow. We had him do quite a bit of work around the office, small jobs in carpentry work when he was off his own job and also at the house. He always acted perfectly all right. He never complained at all about his heart hurting him while he was around us. My wife saw him at the house and I saw him at the office. So personally, I—he was a fine, honest fellow as far as I could ever tell.

Q. Apparently he did the carpenter work for you. Was that after October '53? A. Yes, yes. Oh, yes, all of this—the first time I saw him for years was October, 1953.

Q. How much after October, 1953 did he do the carpenter work for you? A. I went to the hospital myself for quite a long stay in the hospital, about six weeks in October, '55. So I never saw him after that.

Q. Yes. What I have reference to, Doctor, was he doing carpenter work for you immediately after October, 1953? A. Well, I don't—I can't tell you whether it was a month after or—but many times—I will say 1953 [40] followed '53, '54 and '55, yes. I can't tell you how many times.

Q. Now, you said on direct examination that you advised for him to cut down on his exercises? A. That's right.

Q. You mean at work or— A. At any place. You remember I said excessive exercise or over-exercises.

Q. Oh, you told him to cut down on over-exercises? A. That's right.

Q. Not normal exercise? A. No.

Q. And the work which he did for you, you considered that to be not over-exercise? A. That's right.

Q. Didn't you? A. That's right.

Q. And that wouldn't hurt him, would it? A. No. Part of his livelihood.

Q. And you have nowhere in your notes, do you, Doctor, that Mr. Gorey ever lost any time from his work on account of his heart, do you? A. No, I do not.

Q. And you don't remember him ever having told you he lost any time from that work, do you? A. No, that's right, he never mentioned his heart as far as I can recall after 1953."

Verda A. Gorey testified on redirect examination [R. 04]:

"Q. (By Mr. McManus): Mrs. Gorey, did your husband ever complain of any illness prior to his death? A. Just pains in his chest.

Q. And how long before his death did he complain of pains in his chest? A. About two or three months before.

Q. And would you explain just briefly to the jury what [82] type of carpenter work your husband did. A. Well, he was, oh, what they call a framer, putting up the structure of the house and mainly what he did at one time he was roofer but just prior to his death that's what he was doing.

Q. And, Mrs. Gorey, do you know whether or not your husband ever took any nitroglycerin tablets preceding his death? A. No, I do not.

Q. Did he take any sort of medicine before his death? A. Yes, he took some headache pills. At

one time he offered me one for my headache. That's why I happen to know that's what they were.

The Court: Did you take it?

The Witness: Yes.

Q. (By Mr. McManus): Did he ever tell you that he had any nitroglycerin tablets in the house or any other place? A. No, he didn't.

Q. And Mrs. Gorey, when were you first aware that your husband may have had heart trouble? A. At the time of his death."

POINTS AND AUTHORITIES IN SUPPORT OF VERDICT AND JUDGMENT.

Court Was Right in Denying Motion for Directed Verdict.

Appellant commences its attack on the verdict and judgment by claiming that *as a matter of law* the Court should have directed a verdict in appellant's favor.

Appellant on page 14 of its brief cites three cases to support its contention that a false answer in an application by a life insurance applicant will avoid a policy later issued in reliance on the application. The three cases cited are:

San Francisco Lathing Company v. Penn Mutual Life Insurance Co., 144 A. C. A. 185, 300 P. 2d 715;

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 581, 281 P. 2d 39;

California-Western States Life Ins. Co. v. Feinstein, 15 Cal. 2d 413, 101 P. 2d 696.

In each of the above cases cited by appellant there had been a trial to the Court, and the trial court had *found* the facts *against* the beneficiaries of the policies. In

each case the beneficiary appealed, and asked the Appellate Court to hold that the evidence did not support the findings of the trial court which request was properly refused in each case. We have just the opposite situation in the case at bar where the jury *found* the facts *in favor* of the beneficiary, and it is the insurance company which is asking the Court to hold that *as a matter of law* the evidence did not support the jury's findings. Appellee has no quarrel with the rule of law that a false answer by a life insurance applicant in his application will avoid a policy of life insurance issued by the insurer in reliance on the application, but in the case at bar the jury evidently found from the evidence that there was no false answer. It might be noted in passing that the stipulation [R. 13] does not say that appellant relied solely on the application, but that appellant "relied upon the application, the report of the medical examiner of defendant and the report of inspection by defendant's Agent."

Defendant Did Not Make False Answers to Any of the Questions Contained in the Application for Insurance.

Appellant claims the answers given by the insured to questions numbered 54B and 60 of the application for insurance were false.

Question 54B was: Have you ever had any ailment or disease of: B Heart or lungs? Yes or no. The answer given is no.

There is a conflict in the evidence as to whether George E. Gorey had heart disease. He consulted Dr. Kerchner, Sr., on one occasion, and the doctor diagnosed his complaint as coronary insufficiency, not far advanced [R. 52, 60]. On the other hand there is the appellant's Exhibit

A1 which is a report by the appellant's medical examiner showing the applicant, George E. Gorey to be in good health and nothing wrong with his heart. In order for the answer to question 54B as it is phrased, to be false, there must actually have been something wrong with his heart.

Appellant Is Estopped to Assert the Defense of Material Misrepresentation by the Insured.

The testimony of appellant's district manager. Mr. Lawson W. Smith [R. 76] was that an agent of the appellant wrote all of the answers to the questions on the application, and that the only handwriting of George E. Gorey on the application was his signature. The recent case of *Boggio v. California-Western States Life Insurance Company,* 108 Cal. App. 2d 597, 239 P. 2d 144, was one in which a widow brought suit against an insurance company to collect on a policy of life insurance issued by the defendant company. The defendant resisted plaintiff's claim on the ground of alleged false statements made by the insured concerning his health. Trial was to the Court, judgment for plaintiff, and defendant appealed. On December 7, 1948, Robert Boggio signed an application for life insurance and died five months later. Defendant refused to pay and claimed the policy to be void by reason of false answers contained in the application. Two of the questions asked were:

"Have you now or have you ever had (listing specified diseases or injuries) or any other injury?" The answer given was "none." A like answer was given to another question about consultations with physicians during the ten years prior to the application. The Court said these answers were literally false because Robert had suffered a blow on the head resulting in a subarachnoid hemorrhage

in 1945 while in the Navy and was hospitalized at that time for several weeks. Defendant claimed material misrepresentation which voided the policy.

The Court found additional facts in this case as follows: The insurance was sold by Louis P. Angelino who had been an agent of the defendant for 25 years. Angelino had known the Boggio family for twelve years, had handled all of their insurance needs, and they had faith and confidence in him. Angelino was fully acquainted with Robert Boggio's hospitalization. The application was written entirely in the handwriting of Angelino, only the signature being written by Robert. Robert made full disclosure to Angelino concerning the injury when Angelino filled out the application. Angelino asked Robert what kind of discharge he had from the Navy and when informed it was honorable and not medical, he said, "Well as long as you do not have a medical discharge they don't care about all this. As long as you have an honorable discharge and not a medical discharge you can sign this application."

The defendant company relied for its defense upon three well established propositions: 1. misrepresentation as to material facts will void an insurance contract; 2. knowledge of the facts by a soliciting agent having limited authority will not relieve assured from responsibility for his own omission or misstatements in the application; and 3. when the assured has the application in his hands he may not plead ignorance of misstatements therein. In answer to these defenses the Court said the insured had stated the facts fully to Angelino, and because of the agent's misrepresentations, believed he had given answers which were truthful. He relied on the agent's superior knowledge in insurance affairs and in good faith signed

the application. "From these findings it appears that the misrepresentation upon which defendant relies occurred through the fraud or negligence of its agent and not through any of the insured." The Court further said to allow the insurer under these circumstances to place the responsibility upon the insured would be manifestly unjust and allow it to profit by its own wrong. The Court said the insurance company was estopped to assert the defense of material misrepresentation. The Court cited with approval from Cooley's Briefs on Insurance as follows:

> "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy."

So in the case at bar, there were two people present when the application was signed, the deceased and appellant's agent, and only they knew what was said. The deceased could not be produced to tell his version of what took place, and the appellant failed to produce its agent. The jury could have felt through a *lack* of evidence on the part of appellant that the insured could have made a full disclosure of all facts to appellant's agent, but through the fraud, mistake or negligence on the part of appellant's agent, George E. Gorey believed he was making truthful answers to all questions. And if the jury did so believe, then appellant is estopped to assert its defenses.

The Evidence Supports a Jury Finding That the Insured Was Not Aware of a Heart Ailment or Disease, if He in Fact Did Have a Heart Ailment or Disease.

Dr. Kerchner testified that he made a diagnosis of coronary insufficiency. His further testimony is:

"Q. You are able to recall now at this time what you told him? A. I only because I do it to other people. I tell everybody. I have practiced the same with him as I have with others. I do not specifically recall that I showed him pictures of the heart but I show it to people who have this trouble, explain it to him.

Q. What I am trying to get at, Doctor, is not how you treat your other patients but how you treat this particular patient, if you can remember of your own knowledge now what you told him at that time. A. No, I can't remember exactly the words that I told him.

Q. But you do recall, do you, tell him that his condition was not too far advanced? A. That's right.

Q. Is that your testimony? A. That's right.

Q. And, as a matter of fact, you never can tell a heart patient that his condition is really bad, can you, Doctor? A. That's right. We have to be very careful because of creating a neurosthenia or a cardiac invalid. The patient [37] is sometimes so worried about their heart, they then will have to be an invalid or their family will have them sick all the time, that they actually will feel sick. So we actually have to be very careful the way we tell them about it. Sometimes we can't even tell them. It is very very bad for them to give them that. It is a hardest thing to tell a patient exactly even if we know it.

> The electrocardiogram cannot always show exactly how severe this trouble is. It might have been very severe at that time. It might not have been, because the record only showed that he had this trouble after he exercised. If he hadn't exercised, we wouldn't know he had it at all."

From this testimony of appellant's witness the jury could have concluded that George E. Gorey was not aware he had a heart ailment or disease, if he in fact did have one.

In the case of *Stipcich v. Metropolitan Life Insurance Company,* 277 U. S. 311, 72 L. Ed. 895, 48 S. Ct. Rep. 512, which went up from the Ninth Circuit, the District Court had granted a motion for a directed verdict, but the Supreme Court reversed, and said:

> "Insurance policies are traditionally contracts uberrimae fidei and a failure of the insured to disclose conditions affecting the risk, OF WHICH HE IS AWARE, makes the contract voidable at the insurer's option." (Emphasis are counsel's.)

Cause of Death.

The evidence is far from satisfactory that George E. Gorey died from a heart condition. Dr. Kerchner did not testify as to cause of death; and the doctor who signed the death certificate (son of Dr. Kerchner) was not in Court to testify.

Question 60 of the Application.

Question 60 of the application was:

> "State names and addresses of physicians you have ever consulted and give the occasion by reference to question numbers and letters above."

The answer is—None.

This application was made at a time when the assured was actually being treated by Dr. Kerchner for a knee injury. The doctrine of estoppel applies to this question the same as it did to question 54B. Only the agent and the deceased knew what was said. The leg of the insured could have been in a cast, but the agent could have told the insured that the company was not interested in this type of sickness, and could have represented to the insured through fraud, negligence or mistake that a "none" answer would be correct and truthful.

Then as stated by the trial judge [R. 108]:

> "Even without that the jury might draw an inference from all the circumstances that certainly here was a question that no one, certainly very few people in the United States at the age of 31 could answer 'No.' I just wonder how many people who can say at the age of 31 that they had never consulted a physician."

In the case of *Aetna Life Insurance Company v. Hub Hosiery Mills* (1948), 170 F. 2d 547, 74 Fed. Supp. 599, the insurance company refused to pay the beneficiary after the death of the insured on the ground the insured had stated in his application he had last consulted a physician in 1941 whereas he had consulted one in 1946 and also on the day before delivery of the policy. The Court said regarding this contention of the company:

> "Insurance contracts are not to be construed with absolute literalness. They are to be construed as ordinary persons in the situation of the contracting parties would construe them."

The Electrocardiogram.

Appellant states that the evidence is uncontradicted that the insured misrepresented and concealed from appellant's medical examiner the fact that he had undergone an electrocardiogram.

It is the claim of the appellee, however, that there is not one scintilla of evidence in the record that the insured misrepresented or concealed the fact of an electrocardiogram. The appellant did not produce Dr. Groff, its medical examiner to testify, and Dr. Groff is the only living person who has knowledge of such alleged misrepresentation and concealment. In any event whether the insured did or did not, it is immaterial here as Section 10113 of Insurance Code provides in effect that the policy together with the application is the entire contract. Section 10113 of the Insurance Code reads:

> "10113. POLICY AS ENTIRE CONTRACT. Every policy of life, disability or life and disability insurance issued or delivered within this State on or after the first day of January, 1936, by any insurer doing such business within this State shall contain and be deemed to constitute the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by laws, rules, applications or other writings, of either of the parties thereto or of any other person, unless the same are indorsed upon or attached to the policy; and all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties. Any waiver of the provisions of this section shall be void."

The Good Health of the Insured.

Appellant argues that the policy never became effective unless the insured was in actual good health at the time of the delivery of the policy.

This question was raised in the recent case of *Brubaker v. Beneficial Standard Life Insurance Company,* 130 Cal. App. 2d 340, 278 P. 2d 966. In this case the application was signed in March, 1952, and the insured died in November of the same year of cancer. The California Court said there are two rules for the construction of insurance contracts: 1, The Massachusetts rule in which actual good health is required, and 2, the rule opposed to the Massachusetts rule. The California Court said the Massachusetts rule is too harsh. The Court cited with approval language used in the case of *Chase v. Sunset Mutual Life Insurance Association,* 101 Cal. App. 525, which said:

> "If . . . such representations were honestly made, and were justified by the decedent's then knowledge of his physical condition, the mere fact that the representation of the insured were proved to be unfounded by subsequent events, in the absence of fraud or deceit, would not void the policy."

The Court said that the above views found support in two settled principles of law: 1, insurance policies are to be construed liberally in favor of the assured; and 2, courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed.

The Instructions.

The instructions as given by the Court appear to be correct and in accord with the decided cases. Appellant's fourth objection to the instructions, the one dealing with expert testimony appears to be entirely without merit. There were two expert witnesses, Dr. Kerchner and the letter of Dr. Travis Windsor. It was necessary for appellant to prove at the trial that George E. Gorey had an ailment or disease of the heart in order to show that he answered question 54B falsely. If the insured did not have a heart condition in fact there could never be an issue of concealment of a heart condition.

As to the instructions requested by the appellant but refused by the Court, all of such instructions are either not a correct statement of the law or they have been otherwise included in the Court's instructions as given.

Conclusion.

Appellee contends the evidence is ample to support the jury's verdict; that the appellant failed in its attempt to establish its defenses of misrepresentation and concealment; and that in the determination of this appeal the Court should consider all of the evidence and all inferences which can be reasonably drawn from the evidence in a light most favorable to the appellee.

Respectfully submitted,

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